Congressional Research Service

Memorandum December 8, 2004

TO: Hon. Byron L. Dorgan

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SUBJECT: Statutory Requirements Regarding Payment Terms for Exports of Agricultural Products to Cuba

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This memorandum responds to your request for a legal analysis of the term "payment of cash in advance" as found in § 908(b)(1) of the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSREEA), 22 U.S.C. § 7207(b)(1).[1] The question has arisen whether the term requires that payment be received by U.S. exporters before goods are shipped to Cuba or whether payment may be received at other points in the shipping process so long as payment is received before the Cuban purchaser takes possession of the items in question. As explained below, arguments can be made that an overly strict reading of the statute may not be reasonable in light of the fact that trade transactions may apparently be structured so that cash payment may be received by exporters after shipment but before possession and still comply with statutory requirements.

[1] The Trade Sanctions Reform and Export Enhancement Act of 2000 (TSREEA) is Title IX of P.L. 106-387, the Agriculture, Rural Development, Food and Drug Administration, and Related Agency Appropriations Act, FY2001, enacted October 28, 2000, and is codified at 22 U.S.C. §§ 7201 *et seq.*

within the 12-month period beginning on the date of the signing of the contract, except that the one-year license requirements are to be no more restrictive than existing Department of Commerce export license exceptions or Treasury Department (*i.e.* Office of Foreign Assets Control) general licenses.[3]

In addition, the TSREEA places further restrictions on trade with Cuba, including the payment provision at issue here, § 908(b)(1) of the statute. The provision prohibits financing of sales of agricultural commodities or products to Cuba, as follows:

> No United States person may provide payment or financing terms for sales of agricultural commodities or products to Cuba or any person in Cuba, except in accordance with the following terms (notwithstanding part 515 of title 31, Code of Federal Regulations, or any other provision of law):
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> (A) Payment of cash in advance.
> (B) Financing by third country financial institutions (excluding United States persons or Government of Cuba entities), except that such financing may be confirmed or advised by a United States financial institution.
>
> Nothing in this paragraph authorizes payment terms or trade financing involving a debit or credit to an account of a person located in Cuba or of the Government of Cuba maintained on the books of a United States depository institution.[4]

The President is directed "to issue such regulations as are necessary to carry out this section, except that the President in lieu of issuing new regulations, may apply any regulations in effect on October 28, 2000, pursuant to the Trading with the Enemy Act, with respect to the conduct prohibited in paragraph(1)."[5]

The term financing is defined to include "any loan or extension of credit."[6] The term "payment of cash in advance" is not defined in the statute.

When the Office of Foreign Assets Control (OFAC), Department of the Treasury issued its implementing regulations in July 2001, it authorized all transactions ordinarily incident to the export of goods from the United States to any person in Cuba, provided the following were complied with: (1) the exports were licensed or otherwise authorized by the Department of Commerce and (2) only the listed "payment or financing terms may be used," including "payment of cash in advance."[7] The quoted phrase was not defined in the regulations, nor

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[3] TSREEA, § 906(a)(1), 22 U.S.C. § 7205(a)(1). This provision does not apply to the export of agricultural and medical items to the Government of Syria or to the Government of North Korea. TSREEA, § 906(a)(2), 22 U.S.C. § 7205(a)(2).

[4] 22 U.S.C. § 7206(b)(1).

[5] TSREEA, § 908(b)(3), 22 U.S.C. § 7207(b)(3).

[6] TSREEA, § 908(b)(4)(A), 22 U.S.C. § 7207(b)(4)(A)..

[7] 31 C.F.R. § 515.533(a)(2)(i), as set forth in Dep't of the Treasury, Office of Foreign Assets Control, "Exports of Agricultural Products, Medicines, and Medical Devices to Cuba, Sudan, Libya and Iran; Cuba Travel-Related Transactions; Interim rule with request for comments; amendments," 66 Fed Reg. 36683, 36687 (2001).

did OFAC discuss the term in the explanatory section of its *Federal Register* notice. OFAC merely noted at the time that it was:

> amending § 515.533 to clarify the general restrictions on financing sales of licensed items to Cuba and to implement the special financing restrictions with respect to licensed agricultural sales to Cuba contained in Section 908(b) of the TRSA. The new language slightly expands the payment and financing terms that may be used in agricultural sales to Cuba from those that previously existed.[8]

The phrase exists in this form – *i.e.*, with identical language and without definition – in current regulations[9] and was not discussed in the most recent *Federal Register* notice pertinent to § 551.533, namely the notice of March 24, 2003, which announced, *inter alia*, an amendment to the subsection that provided for a general license authorizing certain U.S. sales contracts with Cuban nationals.[10]

Recently, a dispute has developed over the precise meaning of the phrase "payment of cash in advance." Apparently, under past practice, arrangements have been made so that agricultural goods have been shipped from the United States with cash payment being made to the U.S. exporter during shipment but before the Cuban purchaser takes title to the goods. According to various press reports, the OFAC has now indicated that the quoted phrase requires that payment be received by the exporter in advance of shipment of goods from the this country.[11] You have asked whether this interpretation of the statutory phrase "payment of cash in advance" is in fact required by the TSREEA or whether other payment procedures may be used so long as payment is received before the recipient takes possession of the exported items.

Whether the meaning of the term "payment of cash in advance" has been expressly addressed by Congress. As noted earlier, the TSRREA does not define the term "payment of cash in advance" and thus does not expressly indicate whether payment in advance of shipment is required under the term. Further, as explained below, the term does not appear to be commonly understood in trade practice as necessarily meaning payment in advance of shipment. In this regard, shipment does not appear to be the key factor in

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[8] *See* 66 Fed. Reg. at 36685.

[9] *See* 31 C.F.R. § 515.533(a)(2)(i)(2004).

[10] Under the license, "persons subject to U.S. jurisdiction to negotiate and sign contracts with Cuban nationals for sales of products from the United States of 100% U.S.-origin products from overseas subsidiaries provided such exports are consistent with current Department of Commerce licensing policy and provided performance of such contracts is expressly made contingent upon the prior authorization by the Department of Commerce." Dep't of the Treasury, Office of Foreign Assets Control, "Cuban Assets Control Regulations: Family and Educational Travel-Related Transactions, Remittances of Inherited Funds, Activities of Cuban Nationals in the United States, Support for the Cuban People, Humanitarian Projects, and Technical Amendments; Interim final rule; amendments," 68 Fed Reg. 14141, 14144 (2003), describing new 31 C.F.R. § 515.533(b). The amendment was announced under a heading titled "Technical Corrections and Clarifications" and was described as a "change [that] further implements the Trade Sanctions Reform and Enhancement Act of 2003." 68 Fed. Reg. at 14143, 14144.

[11] *See, e.g.*, "OFAC Threatens Millions of Dollars of Food Exports to Cuba," *Inside U.S. Trade*, Nov. 26, 2005, at 1.

determining the risks and liabilities associated with a shipping transaction, nor in determining whether a transaction involves financing.[12]

If one considers the statute as a whole, it would seem to be designed to remove and discourage prohibitions and restrictions on trade in agricultural and medical products – indeed, it generally requires congressional approval of future unilateral agricultural and medical sanctions – all the while placing certain restrictions on any newly-allowed trade with Cuba, including a prohibition on financing except through third-country banks. Considered in this context, one could argue that Congress intended that trade with Cuba take place and thus the term should be interpreted in a manner that allows various permutations of cash-in-advance payment so long as financing – defined as "any loan or extension of credit" – does not occur. In other words, OFAC should not define the term so narrowly that it prohibits transactions that do not strictly involve financing, thus preventing the trade that Congress intended to allow under the statute.

One could further argue that the overriding intent of Congress in TSREAA was to facilitate trade in agricultural and medical products, given TSREEA's broad definition of what constitutes an unilateral agricultural or medical sanction and the requirement that, except in some specific military and national security-related circumstances, any new measure of this type may be imposed only if a joint resolution of approval is enacted into law. For example, the statute defines the term "unilateral agricultural sanction" as "*any* prohibition, *restriction, or condition* on carrying out an agricultural program [*e.g.*, any commercial export sale of agricultural commodities] with respect to a foreign country or foreign entity that is imposed by the United States for reasons of foreign policy or national security" except for measures based on enumerated multilateral actions. [13] One could thus argue that in interpreting the statute, the administrative agency must be careful not to create new restrictions or conditions on carrying out commercial export sales of agricultural commodities for reasons of foreign policy or national security since these would require legislative approval.

Were, however, the broader examination of the statute not to provide sufficient guidance as to the proper interpretation of the term "payment of cash in advance," legislative history, if examined, would also seem to provide little additional help as to its precise meaning. As shown below, the legislative history of the enacted legislation does not appear to contain the type of focused discussion of the term that would indicate whether Congress intended the term to have a specific meaning of Congress' own choosing or whether it understood the term to have any specific customary trade meaning with regard to when cash payment was to be received by the exporter in an otherwise authorized transaction.

While a number of sanctions reform proposals were introduced in the 106th Congress, legislation of the type enacted in TSREEA, that is, legislation that would generally terminate existing unilateral agricultural and medical sanctions and require that any new sanctions of this type be approved by joint resolution, is derived from proposals introduced in the 106th Congress by Rep. Nethercutt and Sen. Ashcroft. H.R. 3140, then called the Food and Medicine for the World Act, was introduced by Rep. Nethercutt, on October 25, 1999. S. 1771, with the same short-title, was introduced the same day by Sen. Ashcroft. Each of these bills would have also required that new unilateral agricultural and medical sanctions last for

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[12] *See infra* notes 35-54 and accompanying text.

[13] TSREEA. § 902(6), 22 U.S.C. § 7201(6)(emphasis added).

only two years, but that such measures could be extended for another two years if approved by Congress. While the bills would have maintained certain prohibitions on providing U.S. assistance to countries that were state sponsors of terrorism, there were no restrictions in the bills that applied only to Cuba.

An expansion of the original House sanctions reform proposal, now titled the Trade Sanctions Reform and Export Enhancement Act of 2000 and generally containing the provisions enacted into current law, but without the Cuba-specific restrictions, was eventually included as Title VIII of H.R. 4461, the House agriculture appropriation for FY 2001, as reported from the House Committee on Agriculture.[14] The Title was struck from the bill on the House floor, however, as nongermane.[15]

Prior to introducing S. 1771, Senator Ashcroft had introduced sanctions reform legislation as an amendment to the Senate FY2000 agriculture appropriation (S. 1233); a motion to table the amendment was defeated 70 to 28[16] and the amendment later passed on a voice vote.[17] The provision was dropped in conference, there being no similar House-passed provision.[18] A version of Senator Ashcroft's bill was subsequently offered and adopted as a committee amendment to the Senate agriculture appropriation for FY2001,[19] and was later included in the Senate amendment to H.R. 4461, as passed the Senate.[20] Like the House-reported provision, the measure did not have any specific requirements for trade with Cuba. The restrictions that are currently in place were contained in the conference version of the bill (H.Rep. 106-948), ultimately passed by the House and Senate, and enacted as P.L. 106-387. There was no discussion of the financing provision in the conference report.[21]

The Cuba-related provisions, which also included a reaffirmation of the existing regulatory prohibition on imports of goods from Cuba, were, however, discussed during House consideration of the conference report by a proponent of the restrictions:

> The compromise authorizes sales of United States agricultural commodities to the Cuban regime; but without American financing ....
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> In other words, the primary objective of the Cuban dictatorship that the United States taxpayers subsidize the regime, in effect taking the place of the former Soviet Union, is not permitted. Nor can the Cuban dictatorship dump its agricultural products on the United States market, to the serious detriment of American farmers. That dumping, by the way, Mr. Speaker, is another fundamental goal of the Cuban regime.
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> At the same time, the Cuban dictatorship after this legislation will no longer have the excuse with regard to the great food shortages that it has created for the Cuban people while foreign tourists and the regime's hierarchy have access to all the luxuries that

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[14] H.R. 4461, Title VIII, 106th Cong., 2d Sess. (2000), as reported (H.Rep. 106-619).

[15] 146 Cong. Rec. H5711 (daily ed. July 10, 2000).

[16] 145 Cong. Rec. 10114 (daily ed. Aug. 3, 1999)

[17] *Id.* at S10181 (daily ed. Aug. 4, 1999).

[18] *See* H. Rep. 106-354.

[19] S. 2536, Division B, Title IV, 106th Cong., 2d Sess. (2000), as reported (S.Rep. 106-288, at 201). *See also Congressional Quarterly Almanac 1999*, at 23-24.

[20] *See* 146 Con. Rec. S7556, S7572-S7573 (daily ed. July 25, 2000).

[21] *See* H.Rep. 106-948, at 152.

> dollars can buy. It will no longer have the excuse of a legal inability to purchase American agricultural products.
>
> Mr. Speaker, so while United States farmers look at new markets in this legislation, especially in other countries dealt with by the agreement, key pressure and leverage are maintained for a democratic transition in Cuba.
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> The agreement takes note of the floor votes regarding Cuba policy by the House and Senate in the recent past: the votes regarding agricultural sales to Cuba; the differing votes in the House and Senate with regard to travel, the Senate having voted against U.S. unrestricted travel to Communist Cuba, and the strong vote against totally dismantling the U.S. embargo on the Cuban dictatorship by this House on July 20 of this year.[22]

During Senate consideration of the conference report on H.R. 4461, some Senators expressed concern that the financing provision proposed and inserted by the House would limit trade with Cuba, thus restraining the broader intent of the Senate-passed version of the sanctions reform legislation.[23] More specific discussion of the financing provision was engaged in, however, by Senator Ashcroft, who with Senator Hagel had been a drafter of the original Food and Medicine for the World Act. Regarding financing, Senator Ashcroft stated that:

> ... all sales to these [*i.e.* then-sanctioned] countries can be freely financed by U.S. banks, but the House added a restriction that will prohibit U.S. banks from being the primary financial institution in any sales to Cuba. U.S. banks will be able to facilitate transactions, but they won't be allowed to assume the risk of the Cuban buyers. While this policy is not my preference, I will point out that it is not a step backward. It simply keeps in place the current restrictions that exist in U.S. law.[24]

Noting their position as drafters of the original sanctions legislation, Senator Ashcroft, for himself and Senator Hagel, then inserted into *Congressional Record* a "statement of intent on how this proposal should be implemented by the Administration."[25] The statement reviewed the legislative history of the sanctions reform legislation, stated the legislation's purpose, and provided a section-by-section analysis. Regarding the statute's purposes, the statement provides the following:

> The overall purpose of this title is clear: to eliminate unilateral food and medicine sanctions and to establish new procedures for the future consideration of such sanctions. In drafting this provision, the intent of the authors is to expand export opportunities for United States agricultural and medical products beyond that currently provided for in law and regulations. As the original sponsors of this provision, we would like to outline briefly what we believe the intent of this provision to be, in order to ensure that agencies that will implement this legislation fully appreciate the expectations of the sponsors. We expect that the regulations to implement this provision will promptly liberalize the current administrative procedures for the export of agriculture and medicine.[26]

The statement later addressed the financing provision as follows:

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[22] 146 Con. Rec. H9670 (daily ed. Oct. 11, 2000)(remarks of Rep. Diaz-Balart).

[23] *Id.* at S10670 (remarks of Sen. Leahy); S10673 (remarks of Sen. Harkin); S10681 (remarks of Sen. Dodd); S10692 (remarks of Sen. Durbin); S10699 (remarks of Sen. Kohl).

[24] 146 Cong. Rec. S10689 (daily ed. Oct. 18, 2000).

[25] *Id.*

[26] *Id.* at S10690.

> Specifically with regard to Cuba, subsection(b) of section 908 prohibits any United States person from financing U.S. agricultural exports to Cuba. However, in order to accommodate sales of agricultural commodities to Cuba, subsection(b) specifically authorizes Cuban buyers to pay U.S. sellers with cash in advance, or to utilize financing through third country financial institutions.
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> While they cannot extend financing to Cuban buyers, U.S. financial institutions are specifically authorized to confirm or advise letters of credit related to the sale that are issued by third country financial institutions. Under this procedure, third country financial institutions can manage the Cuban risk associated with these transactions. In turn, the third country financial institution issues a letter of credit free to be confirmed by a U.S. bank, which assumes no Cuban risk. This provision, which creates a "firewall" against "sanctioned-country risk," is consistent with the role played by third country banks in transactions with some other countries subject to U.S. sanctions.
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> U.S. financial institutions may act as exporters' collection and payment agents, confirm third country letters of credit, and guarantee payments to the U.S. exporters. The provision of such export-related financial services by U.S. financial institutions (commercial banks, cooperatives, and others) will allow U.S. farmers, their cooperatives, and exporters to be assured that they will be paid for exported commodities.[27]

While the above-quoted Senate discussion does not expressly address the definition of "payment of cash in advance," it does appear to evidence some congressional intent that U.S. banks not assume purchasing-country risk in connection with an export transaction and, combined with the stated intent of liberalizing trade with affected countries, may support an argument that the term not be interpreted in an overly strict way so long as, in any otherwise-authorized transaction, risk is not assumed by a U.S. bank or the individual U.S. exporter. Moreover, the quoted House statement appears to anticipate future trade with Cuba notwithstanding the conditions insisted upon by the House.

Whether OFAC's interpretation of the term is reasonable. Absent a definition of the term in the statute and express discussion of the term in legislative history, and in light of the overall structure of the statute, the term "payment of cash in advance" can seemingly be viewed as ambiguous, thus requiring an examination of the reasonableness of OFAC's proposed interpretation. We assume for purposes of this memorandum that were the OFAC interpretation to be challenged in court, the proper standard of review would be that set forth by the U.S. Supreme Court in *Chevron U.S.A. v. National Resources Defense Council,*[28] under which the reviewing court would first determine whether Congress had spoken to the issue at hand, and if it found the statute to be ambiguous, would defer to the agency interpretation provided it is reasonable and permissible under the statute.[29] Courts have often

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[27] *Id.* at S10691.

[28] Chevron U.S.A. v. National Resources Defense Council, 467 U.S. 837 (1984).

[29] The *Chevron* standard was articulated and elaborated upon by the Supreme Court as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to

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given limited review to OFAC actions, which are for the most part grounded in the very general authorities of the Trading with the Enemy Act or the International Emergency Economic Powers Act, statutes that expressly authorize the President, *inter alia*, to prescribe definitions in implementation of the statutory authorities.[30] At the same time, courts have applied the *Chevron* doctrine where a regulation is challenged and an issue of statutory interpretation is involved, and have thus reviewed the consistency of a regulation with the underlying statutory authority.[31] Moreover, more careful review may be warranted in the instant case because the proposed OFAC interpretation involves the specific authorities and requirements of the TSREEA and thus does not involve the more general policy question of whether a particular embargo should be imposed or the consideration that the trade in a product may be completely banned, a factor that may be present in a TWEA or IEEPA-based embargo case.

It should be noted that a contemporaneous application of OFAC's own regulations would likely merit "an even greater degree of deference than the *Chevron* standard and must prevail unless plainly inconsistent with the regulation."[32] The question at issue here, however, appears to be not whether the proposed interpretation of the term "payment of cash in advance" is properly applied to a particular set of facts, but whether the term may be defined in the manner OFAC has currently proposed, whether the definition is codified at some future date in a regulation or is articulated by OFAC in some other form, is inconsistent with the underlying statute.[33] As such, the level of deference called for by *Chevron* would

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[29] (...continued)

> the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
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> ... If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator an agency.

467 U.S. at 842-44.

[30] *E.g.*, Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999); Havana Club Holding, S.A. v. Galleon S.A., 961 F.Supp. 498, 505 (S.D.N.Y. 1997). Regarding agency authority to issue definitions, *see* Trading with the Enemy Act, ch. 106, § 5(b)(3), 50 U.S.C. App. § 5(b)(3); International Emergency Economic Powers Act, P.L. 95-223, § 204, 50 U.S.C. § 1704.

[31] *E.g.*, Paradissiotis v. Rubin, 171 F.3d at 987 (5th Cir. 1999); Capital Cities/ABC Inc. v. Brady, 740 F.Supp. 1007, 1010-11 (1990); Veterans Peace Convoy v. Schultz, 722 F.Supp. 1425, 1431 (S.D. Texas 1988)(stating that "no interpretation by [O]FAC can frustrate the clearly expressed intent of the Congress ... The Court must reject an agency's statutory interpretations that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."). *See also* Consarc Corp. v. Iraqi Ministry, 27 F.3d 694, 701 (D.C.Cir. 1994)(court must give effect to OFAC regulations issued under the International Emergency Economic Powers Act "unless they contradict express statutory language or prove unreasonable").

[32] Paradissiotis v. Rubin, 171 F.3d at 987; Consarc Corp. v. Iraqi Ministry, 27 F.3d at 701.

[33] *See* Consarc Corp. v. Iraqi Ministry, 27 F.3d at 702, n. 6, *quoting* Itek Corp. v. First Nat'l Bank of Boston, 704 F.2d 1, 10 (1st Cir. 1983), where the court stated that "at some point the judiciary (continued...)

appear to be the proper standard of review in this case. In the case at hand, the question would appear to be whether the term "payment of cash in advance" admits of only one meaning, namely, that payment must be made to the exporter in advance of shipment of the authorized goods to Cuba.

Because the statute generally prohibits U.S. persons from financing trade transactions with Cuba, OFAC may wish to define the term "payment of cash in advance" in a way that ensures that no financing, as the term is defined in the statute, will occur in any transaction and may argue that the only way to do so is to require cash payment before shipment. At the same time, because there appear to be ways to structure trade transactions that preclude financing but allow payment after shipment, a strict reading may not be the only means of guaranteeing that this statutory prohibition will not be infringed. Assuming this as a rationale for OFAC's proposed interpretation, it appears from a review of international trade and finance law that a reasonable argument can be made that OFAC's interpretation places emphasis on the incorrect element of the transaction in attempting to abide by the statutory financing prohibition.[34] Given that there appears to be congressional intent that trade with Cuba not be entirely precluded, OFAC's strict interpretation may serve to contravene this statutory purpose.

International trade and finance law appears to provide four traditional methods of payment for goods: (1) cash in advance or prepayment; (2) payment on account or open account; (3) documentary collection and; (4) documentary credits.[35] To place OFAC's proposed statutory interpretation in context, we will address each of the four traditional methods of payment individually in light of the statutory restrictions on trade to Cuba. It should be noted that the following is not intended to be a definitive discussion of payment and financing terms in international trade, but is instead intended to suggest that there may be various ways in which TSREEA's financing prohibition might be complied with without a requirement that payment be made in advance of shipment.

Cash in advance or prepayment. This is perhaps the simplest and most straightforward method of payment for goods in international trade. In addition, it also appears to be the most compatible with the terms of TSREEA. Cash in advance or prepayment requires that, pursuant to an underlying contract for the sale of goods, the buyer transfers funds into an account accessible by the seller in advance of any manufacture, procurement, or shipment of the goods.[36] While clearly compatible with the statute and OFAC's proposed interpretation, commentators have noted that cash in advance is not a

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[33] (...continued)
must be able to review the extent of Treasury's authority under IEEPA and to determine that certain property is beyond the reach of Treasury's asset control regulations," as a standard that would apply in a challenge to the consistency of OFAC regulations with the underlying statute.

[34] *See, e.g,* Consarc Corp. v. Iraqi Ministry, 27 F.3d at 702 (court examined OFAC definitions of "letters of credit" and "present, future or contingent," as issued under IEEPA, in light of common-usage).

[35] *See* Emmanel L. Laryea, *Payment for Paperless Trade: Are There Viable Alternatives to the Documentary Credit*, 33 LAW & POL'Y INT'L BUS. 3 (2001) [hereinafter Laryea].

[36] *See id.* at 5-6.

popular or widely used method of payment because of the buyer's enormous potential risk.[37] Specifically, it appears that buyers do not favor prepayment agreements because it requires them to tie up valuable capital overseas prior to their receipt of anything of value in return. While it is true that some of these risks can be tempered by the use of "packing or anticipatory credits,"[38] which allow buyers to ensure that the goods are no longer in the seller's possession prior to payment, nevertheless, prepayment appears to be used only among associated companies.[39]

Applying the notion of cash in advance or prepayment to TSREEA appears to present no conflict. While in most instances it appears that a prepayment arrangement will require that payment for the goods be received by the exporter (seller) prior to their shipment, given the possible use of packing or anticipatory credits, it may not always be the case that all of the funds are available to the seller prior to shipment. In fact, it may be the case that only an advance or partial payment is received prior to the goods being shipped or transferred into Cuban control. Moreover, the high risk associated with cash in advance or prepayment transactions appears to render it an underutilized method of conducting international trade. Therefore, restricting U.S. companies to this type of transaction could arguably result in the Cuban importers making the rational economic decision to conduct business elsewhere in an attempt to minimize their potential risks. Such a move could arguably be seen as contrary to the purpose of the statute, which appears to be designed to allow limited trade with Cuba.

Payment on account or open account. Pursuant to this method of payment the buyer of goods enters into an agreement that obligates him to make payment into a specific account, usually controlled by the seller, upon, or within a predetermined period of time after shipment of the goods. In most cases, the seller will present to the buyer documentation establishing the fact that the goods have shipped at the same time as an invoice is presented demanding payment as directed by the terms of the contract.[40] In some cases, however, the seller will present the actual goods along with the payment invoice.[41] In either case the buyer will proffer payment by either a bank check, electronic wire transfer, or other agreed upon method of payment.[42] What distinguishes open account transactions from other forms of payment is that while banking systems are often utilized, no credit, financing, or security is extended by the bank itself.[43]

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[37] *Id.* at 6.

[38] Leo D'Aarcy, Carole Murray, & Barbra Cleave, SCHMITTOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE, 200-01 (10th ed. 2000) [hereinafter Schmittoff's]. Packing or anticipatory credits also have benefits for the exporter (seller), because they allow for payment to be received against a document other than a transport document. This is especially helpful in cases where the parties are not familiar with each others common shipping practices. *Id.*

[39] *See* Laryea, *supra* note 35, at 6.

[40] *See id.* at 7; *see also* Schmittoff's, *supra* note 38, at 146 (describing this type of transaction as a "sight payment").

[41] *See* Laryea, *supra* note 35, at 7.

[42] *See* Mark S.W. Hoyle, THE LAW OF INTERNATIONAL TRADE, ¶ 1345 (2d ed. 1985) [hereinafter Hoyle].

[43] *See* Laryea, *supra* note 35, at 7.

Unlike cash in advance or prepayment, which allocated almost all the potential risk to the buyer, payment on account or open account places the majority of the risk on the seller. In this instance the exporter (seller) lacks an effective mechanism to ensure that the importer (buyer) pays the contract price. This is especially true in instances where the goods and the invoice are delivered at the same time, because potential causes of action against the buyer do not arise until the buyer fails to pay (defaults), at which time the seller may be unable to repossess the goods that he has delivered.[44] Due to the uneven risk allocation in open account situations, it appears that this mechanism is limited to situations where the seller is familiar with the buyer's financial trustworthiness.[45]

Given the fact that payment on account appears to permit the actual transmission of funds to occur after the buyer is in possession of the goods, it cannot be said to be "payment in advance," and therefore, appears to violate the statute. That being said, there remains the possibility that a payment on account scenario could be drafted such that the buyer transmits funds only upon receipt of the invoice, which may, depending on the funds transfer mechanism utilized, result in the seller receiving the funds prior to the buyer's receipt of the goods. This situation could arguably qualify as "payment of cash in advance," as the seller receives payment in full prior to the buyer receiving delivery of the goods. Thus, by focusing on shipment OFAC's interpretation potentially excludes situations where payment on an open account may in fact qualify as "payment of cash in advance." Therefore, it appears possible to argue that OFAC's interpretation may exclude commonly utilized transaction methods and curtail trade with Cuba contrary to the statute's intent.

Documentary collection. Unlike the previous two methods of payment, both of which allocate the majority of the transactional risk to one party or the other, documentary collection[46] appears to more evenly distribute the transactional risk between the parties and thus, appears to be more commonly utilized in international trade.

Generally, a documentary collection transaction has four parties, the exporter (seller), the remitting bank, the correspondent bank, and the importer (buyer). In addition, the transaction will contain both commercial and financial documents.[47] Typically, pursuant to a contract between the buyer and seller, the seller will transfer to the remitting bank the necessary documents (usually a bill of lading, documents of title, and a draft drawn on the importer), who will send the information to the correspondent bank along with a stipulation

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[44] *See* Guenier Treitel, *C.I.F. Contracts*, *reprinted in* BENJAMIN'S SALE OF GOODS, §§ 19-001, 19-185 (A.G. Guest *et al.* eds. 5th ed. 1997).

[45] *See* Laryea, *supra* note 35, at 7-8 (citing domestic transactions and transactions between related companies as examples of situations where payment on open accounts is utilized); *see also* Hoyle, *supra* note 42, at ¶ 1345.

[46] Documentary collection refers to a broad grouping of transactions, contained within the general category are specific types of transactions including, but not limited to, "cash against documents," "documents against payment," "documents against acceptance," or "documentary sale." *See* Laryea, *supra* note 35, at 8; *see also* Hoyle, *supra* note 42, at ¶¶ 1360-1390.

[47] Commercial documents include "invoices, shipping documents, documents of title or other similar documents whatsoever, not being financial documents." *See* Samuel O. Maduegbuna, *The Collection of Bills in International Trade*, 8 BANKING & FIN. L. REV. 155, 167 (1993) [hereinafter Maduegbuna]; *see also* International Chamber of Commerce, UNIFORM RULES FOR COLLECTIONS, ICC PUBLICATION 522, art. 2(b) (1995). Financial documents include "drafts, bills, exchanges and orders." *See* Laryea, *supra* note 35, at 9.

as to whether the transaction is to be a "documents on payment" (D/P) transaction or a "documents on acceptance" (D/A) transaction. If the former (D/P) is specified, the correspondent bank will release the documents to the buyer only after receipt of the negotiated payment. If the latter (D/A) is specified, the documents are released upon the buyer's acceptance of the included draft. Either way, eventually the correspondent bank transmits the funds back to the remitting bank, who in turn makes them available to the seller.[48]

Applying TSREEA and OFAC's proposed interpretation to these types of transactions becomes problematic. This is because in documentary collection transactions the goods "will not be in the buyer's control until either payment or acceptance of a bill of exchange."[49] Thus, it appears that "legal control" of the goods, not their time of shipment, is the focal point of the analysis. OFAC's interpretation of the statute, however, appears to be making shipment, rather than legal control, the analytical focal point. Requiring the analysis to turn on when the goods are shipped appears to have no legal support as it appears that none of the risks or liabilities associated with international trade appear to hinge either on when the goods are shipped, or where they are located in the event of a default. What appears to matter is who possesses legal control of the goods. Furthermore, it appears that, through contractual arrangements, legal control of the goods can be retained by the seller until such time as payment is made. Interpreting the statute to ensure that legal control remains with the seller until payment would appear to satisfy the plain meaning of the statute as payment will have been made "in advance" of the buyer receiving legal control of the goods.

Documentary letter of credit. The documentary letter of credit is by many accounts the most popular method of payment, but it can also be the most complicated. Similar to the documentary payment method, documentary letters of credit involve multiple parties, and thus, spread the risk of loss evenly between the buyer and seller.

Like the documentary payment, documentary letter of credit transactions involve a minimum of four parties, the importer (buyer), the issuing bank, the nominated bank, and the exporter (seller). In this transaction, pursuant to an underlying contract between the buyer and the seller, the buyer directs an issuing bank to make credit available in favor of the seller. The issuing bank then notifies the nominated bank of the available credit, who then notifies the seller. The seller then ships the goods and transfers the required commercial and financial documents[50] to the nominated bank for the purpose of receiving payment. The nominated bank confirms the documents, pays the seller, and then forwards the documents to the issuing bank for reimbursement. The issuing bank also confirms the documents, and reimburses the nominated bank. The issuing bank then delivers the documents to the buyer

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[48] *See* Laryea, *supra* note 35, at 8-9; *see also* Hoyle, *supra* note 42, at ¶¶ 1360-1390; Maduegbuna, *supra* note 47, at 167-68.

[49] *See* Hoyle, *supra* note 42, at ¶ 1375. It should be noted that even the financing provision does not appear to be violated as the banks in this type of transaction are simply acting as agents and are not engaged in any "loans, or extensions of credit," which is how the statute defines "financing." *See* 22 U.S.C. § 7207(b)(4) (2004). In addition, nothing appears to prohibit U.S. companies from simply utilizing third country banks as their remitting banks to avoid even the appearance of impropriety.

[50] *See supra* note 47.

and seeks payment pursuant to the terms agreed upon between the issuing bank and the buyer.[51]

Unlike the previous methods of payment, the documentary letter of credit has the potential to run afoul of the statute. The requirement of "payment of cash in advance," however, is not where the concern appears to arise. Rather, in this transaction there is a binding undertaking by the issuing bank to pay the nominating bank the purchase price upon confirmation of the required documents. Thus, because the issuing back is arguably engaged in a "loan or extension of credit," the statutory prohibition against financing may be implicated unless the parties utilize only third country financial institutions as required. [52]

Turning to OFAC's interpretation that "payment of cash in advance" requires payment of cash in advance of shipment, again it appears that this interpretation arguably focuses on the wrong element of the transaction. If a primary purpose of the documentary letter of credit transaction is security, or minimizing the risk of loss, it is helpful to understand the transaction in this light. From the buyer's point of view this method of payment is preferred because he knows that "no money will be released until the goods are shipped, and documents proving this ... are presented to the [issuing] bank."[53] Conversely, the seller "knows that he will be paid when he has presented documents proving that his side of the contract is complete. In this way a documentary [letter of] credit is not only a method, but a guarantee of payment."[54] The plain text of the statute requires the "payment of cash in advance," but it is not specific as to what part of the transaction payment is required to precede. A review of the documentary letter of credit transaction indicates that payment of cash in advance of control ought to precede the transfer of legal control, not shipment. Recall that the exporter (seller) receives payment when all the documentation is confirmed by the nominating bank, or phrased another way, the seller receives payment when he relinquishes legal control of the goods, via a transfer of the document of title, to the nominating bank. Since the documents still must be confirmed by the issuing bank and the buyer before the transaction is complete and the buyer can take legal control of the goods, arguably "payment of cash in advance" has occurred because the seller will have already been paid (by the nominating bank) before the buyer receives legal control. To require cash payment in advance of shipment would appear to effectively prevent the buyer from receiving the security benefit from this type of transaction, thus destroying any incentive that might have existed to enter into a documentary letter of credit transaction.

Conclusion. In sum, it would appear difficult to find legal support for an interpretation of "payment of cash in advance" that requires payment to be received prior to shipment. As a review of the four traditional methods of payment indicates, it appears customary within the international trade and finance community to place the emphasis on the transfer of legal control, rather than on the date of shipment. In other words, it appears that a seller can ship goods without relinquishing legal control of them, therefore, payment can still be required in advance of the transfer of legal control. Interpreting the statute to require "payment of cash in advance" of legal control appears to enable contracting parties to take full advantage of the available payment options without violating TSREEA. Conversely,

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[51] *See* Laryea, *supra* note 35, at 10-12; *see also* Schmittoff's, *supra* note 5, at 169.

[52] *See* 22 U.S.C. §§ 7207(b)(1)(B) and (b)(4) (2004).

[53] *See* Hoyle, *supra* note 42, at ¶ 1405.

[54] *Id.*

OFAC's proposed interpretation appears to limit the available payment options to those that are considered risky, undesirable, and underutilized. Acceptance of OFAC's proposed interpretation appears likely to result in a reduction of trade with Cuba, which appears to be contrary to the express intent of the Congress.